

Committee on Resources

Witness Statement

WRITTEN TESTIMONY
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of the law firm of
NIELSEN & SENIOR P.C.
to the
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON RESOURCES
on behalf of
DUCHESNE CITY, UTAH

April 4, 2000

INTRODUCTION

To understand the need for H.R. 3468, it is necessary to understand the history of Duchesne City and the Uintah and Ouray Reservation. The following testimony explains why in 1905 a Calvary Captain and Indian Agent applied for two state appropriated water rights for Duchesne City. This testimony will also explain the reason the two water rights belong to Duchesne City, the reason the Ute tribe supports H.R. 3468, and the reason H.R. 3468 is necessary.

I. GENERAL HISTORY OF DUCHESNE CITY

On October 3, 1861, President Abraham Lincoln designated "the entire valley of the Uintah River within Utah Territory, extending on both side of said river to the crest of the first range of contiguous mountains on each side" as an "Indian reservation," as "the valley and surrounding country [was] as yet unoccupied by settlements of [United States] citizens." 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 900 (1904). The extent of the reservation encompassed approximately 2 million acres, *see Hagen v. Utah*, 510 U.S. 399, 402, 114 S. Ct. 958, 961 (1994), including land that is now the city of Duchesne, Utah, *see Presidential Proclamation* 34 Stat. 3139 (1905); *Ute Indian Tribe v. State of Utah*, 935 F. Supp. 1473, 1486 (D. Utah 1996), *rev'd in part and remanded*, 114 F.3d 1513 (10th Cir. 1997). Congress approved the action of President Lincoln in 1864. *See Act of May 5, 1864*, ch. 77, 13 Stat. 63.

In the latter part of the 19th century, federal Indian policy changed. Indians were no longer to inhabit communally owned reservations, but instead were to be given individual parcels of land; any remaining lands were to be opened for settlement by non-Indians. The General Allotment Act, Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, granted the President authority "to allot portions of reservation land to tribal members and,

with tribal consent, to sell the surplus land to [non-Indian] settlers, with the proceeds of these sales being dedicated to the Indians' benefit."

Hagen, 510 U.S. at 402, 114 S. Ct. at 961 (citations omitted). As a result of this Act, in 1894 the Congress directed the President to "appoint a commission," *inter alia*, to negotiate with those Indians on the Uintah Indian Reservation "for the relinquishment to the United States of" their interest "not needed for allotment in severalty to [the] Indians" in the reservation land. Act of August, 15, 1894, §§ 20, 22, 28 Stat. 337. Upon the failure of the first commission, the Congress again directed the President to appoint a commission to negotiate an agreement for the allotment of the Indian's interest in the land. *See* Act of June 4, 1898, ch. 376, 30 Stat. 429; *Hagen*, 510 U.S. at 402-03, 114 S. Ct. at 961. The commission was unable to negotiate an agreement. *Hagen*, 510 U.S. at 403, 114 S. Ct. at 961.

In 1902, Congress passed an Act which provided that if a majority of the adult male members of the Uintah . . . Indians consented, the Secretary of the Interior should make allotments by October 1, 1903, out of the Uintah Reservation. Act of May 27, 1902, ch. 888, 32 Stat. 263. The allotments under the 1902 Act were to be 80 acres for each head of a family and 40 acres for each other member of the tribes. The Act also provided that when the deadline for allotments passed, "all the unallotted lands within said reservation shall *be restored to the public domain*" and *subject to homesteading* at \$1.25 per acre. The proceeds from the sale of lands restored to the public domain were to be used for the benefit of the Indians.

. . . .

. . . On March 3, 1903, Congress directed the Secretary to allot the Uintah lands unilaterally if the Indians did not give their consent by June 1 of that year, and deferred the opening of the unallotted lands "as provided by the [1902 Act]" until October 1, 1904. Act of Mar. 3 1903, ch. 994, 32 Stat. 998. . . . In 1904, Congress passed another statute that appropriated additional funds to "carry out the purposes" of the 1902 Act, and deferred the opening date "as provided by the [1902 and 1903 Acts]" until Mar. 10, 1905. Act of April 21, 1904, ch. 1402, 33 Stat. 207.

In 1905, Congress again deferred the opening date, this time until September 1, 1905, unless the President were to establish an earlier date. Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1069. . . . The Act . . . provided:

"[T]he manner of opening [reservation] lands for settlement and entry, and for disposing of the same, shall be as follows: *That the said unallotted lands . . . shall be disposed of under the general provisions of the homestead and town-site laws of the United States*, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied and entered by persons entitled to make entry thereon."

Id. at 403-05, 114 S. Ct. at 961-62 (footnotes & citations omitted; emphasis added).

"Several years before the opening of the Uintah Indian Reservation," A.M. (Al) Murdock, the first white settler in what is now Duchesne City, "secured a concession from the U.S. Indian Office to establish a small trading post to serve the Indians in the area." John D. Barton, *A History of Duchesne County* 180 (1998). Knowing that the area would soon become a part of the public domain, Murdock apparently "took advantage of [his] location" by increasing his supplies in an attempt to profit from the many people traveling the area looking for possible homestead locations. *Id.*; *see also* Mildred M. Dillman, *Early History of Duchesne County* 190 (1948). Apparently, many of the those who had come to look over the area stayed, and they had a general gathering on about June 1, 1905. *See* Dillman, *supra*, at 190. By June 6, 1905, Murdock "had

pitched a large circus tent just west of the Murdock residence, and had it well supplied with hay, grain, and food supplies. There were 52 men, and one woman, Dora, daughter of Mr. Murdock, and *one Indian, Sugoosie Jack*. This was the beginning of the colonization of Duchesne." *See id.* (emphasis added); Barton, *supra*, at 181. Those present organized themselves as a town, and apparently wanted it called Dora. ⁽¹⁾ Dillman, *supra*, at 190-191.

On June 7, 1905, "the Secretary of the Interior directed the Commissioner of Indian Affairs to cause to be selected . . . one or more tracts of land, suitable for townsite purposes, in the Uintah Indian Reservation Lands [in order that they] might be reserved under the [townsite act provisions]." Presidential Proclamation, 34 Stat. 3139. On July 6, 1906, the Acting Commissioner of Indian Affairs informed the Secretary that three such sites had been found and recommended that they be reserved under the provisions of the townsite act. *See id.* Apparently, Murdock and others located in what is now Duchesne were instrumental in securing the Commissioner of Indian Affairs' recommendation. *See* Barton, *supra*, at 181; Dillman, *supra*, at 190-91.

Although the Indians never consented to the allotment provisions of the Act, President Theodore Roosevelt, proclaimed on July 14, 1905:

Whereas it was provided by the [1902 Act], among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, "*shall be restored to the public domain*: Provided, That persons entering any of said lands under the homestead laws shall pay therefor at the rate of [\$1.25] per acre."

And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the [1903 Act], and was extended to March 10, 1905, by the [1904 Act], and was again extended to not later than September 1, 1905, by the [1905 Act], which last named act provided, among other things: ["That the said unallotted lands . . . *shall be disposed of under the general provisions of the homestead and townsite laws of the United States*. . . ."]

Now therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that all the unallotted lands in said reservation, excepting such as have at that time been reserved for military, forestry and other purposes, . . . will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States; and it is further directed and prescribed that:

. . . .

Any person or persons desiring to found, or to suggest establishing, a townsite upon any of the said lands, at any point, may, at any time before the opening herein provided for, file in the land office a written application to that effect, describing by legal subdivisions the necessity or propriety of founding or establishing a town at that place. The local officers will forthwith transmit said petition to the Commissioner of the General Land Office with their recommendation in the premises. Such Commissioner, if he believes the public interests will be subserved thereof, will, if the Secretary of the Interior approve thereof, issue an order withdrawing the lands described in such petition, or any portion thereof, from homestead entry and settlement and directing that the same be held for the time being for disposal under the townsite laws of the United States in such manner as the Secretary of the Interior may from time to time direct; and, if at any time after such withdrawal has been made it is determined that the lands so withdrawn are not needed for townsite purposes they may be released from such withdrawal and then disposed of under the general

provisions of the homestead laws in the manner prescribed herein.

34 Stat. 3119-22.

Pursuant to Presidential Proclamation, on July 7 and 27, 1905, the Secretary of the Interior approved selections made by the Uintah Allotment Commission and reported by the Commissioner of Indian Affairs, for reservation as townsites. *See* 34 Stat. 3139. Consequently, on July 31, 1905, President Roosevelt reserved the land where the town of Duchesne, Utah, is located as a townsite. *See id.* A few days earlier, on July 26, 1905, the Commissioner of the General Land Office, had instructed that a survey be done. *See* 1905 Field Notes; Plat of the Reservation for the Townsite of Duchesne Utah (hereinafter referred to as "Plat"). The townsite plat was entered in the General Land Office on November 16, 1905. *See* Plat. Thus Duchesne City came into existence.

II. INDIAN IRRIGATION PROJECTS

The first federal venture in Indian irrigation was authorized by the Act of March 2, 1867, which appropriated fifty thousand dollars for the "expense of collecting and locating the Colorado River Indians in Arizona . . . including the expense of constructing a canal for irrigating said reservation." Construction was completed under supplementary appropriations, "but the project was abandoned later after several unsuccessful attempts to operate and maintain it."

In 1884, a general appropriation of fifty thousand dollars for irrigation to benefit Indians was authorized to be distributed at the discretion of the Secretary of the Interior. A similar approach followed in 1892 and, beginning in 1893, Congress annually made general appropriations under the description "Irrigation, Indian reservations" for reservations and purposes not provided for in specific appropriations. A later statute prohibited undertaking any new irrigation projects on an Indian reservation or land without specific authorization by Congress after presentation of estimated construction costs.

The Snyder Act of 1921 granted basic authority for irrigation expenditures on Indian reservations to the Bureau of Indian Affairs.

Felix S. Cohen, *Handbook of Federal Indian Law* 729 (1982).

Until 1902 reservation superintendents directed irrigation construction, maintenance, and operation with occasional assistance from temporarily employed engineers. The Appropriations Act of June 17, 1902, ch. 1093, § 4, 32 Stat. 388, 389 (codified as amended at 43 U.S.C. § 419), authorized the Secretary of the Interior to contract for construction of irrigation projects. A chief engineer was appointed for the BIA by the Appropriations Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1028, 1049, and since that time a technical staff and organization have been developed to supervise and carry on Indian irrigation.

Id. at 729 n.14; *see also* Larry A. DiMatteo & Michael J. Meagher, *Broken Promises: The Failure of the 1920's Native American Irrigation and Assimilation Policies*, 19 Hawaii L. Rev. 1, 15 (1997). The Indian Irrigation Service was created in 1909. *See* DiMatteo & Meagher, *supra*, at 15.

The irrigation efforts of the Bureau of Indian Affairs were directly felt on the Uintah Indian reservation.

As early as the 1870s Indian agents assigned to the Uintah Indian Reservation recognized the need for irrigation canals if the land of the reservation was to be transformed into productive agricultural land. Little

by little they and other Indian agents in the West secured small appropriations to construct irrigation canals on Indian reservations. By the 1890s more than a dozen small irrigation canals of various lengths and capacities had been built on the Uintah Indian Reservation. These canals included Number One, Bench, Henry Jim, Ouray School, Gray Mountain, U.S. Dry Gulch, Ouray Park, North Myton Bench, Lake Fork Ditch, Red Gap, and South Myton Bench canals. These canals watered about 3,000 acres of land from Tabiona to Ouray, with the possibility of irrigating many hundreds of acres more.

In 1891 Uintah-Ouray Indian Agent Robert Waugh urged that a more comprehensive and systematic approach be taken in the construction of Indian irrigation canals.

. . . .

In the summer of 1905, Indian agent H.P. Myton, *on behalf of hundreds of Indian allottees*, filed on hundreds of second-feet of water with the state engineer. These water filings were then distributed to the Indian allottees, who were responsible for demonstrating beneficial use.

Barton, *supra*, at 304-06 (emphasis added).

Later, in the middle of June 1906, Congress approved the Uintah Indian Irrigation Project.

The Uintah Indian Irrigation project was established and Congress agreed to appropriate \$600,000 for the project. [Act of June 21, 1906, 34 Stat. 375]. The federal government was to be reimbursed for the irrigation project from the sale of reservation land.

The bulk of the work to construct the project was done by local farmers. By 1913 the Uintah Indian Irrigation project provided water to 85,800 acres, of which 13,000 acres were irrigated. Most of these projects took place in what is now Uintah County

Id. Interestingly, the Act establishing the Uintah Indian Irrigation Project required that the Indian Agencies adhere to the laws of the state of Utah for the appropriation of waters.

Underlying this irrigation policy was the premise that assimilation of the Indians into white society was the most important goal of the United States government. "Congress . . . supported the point of view that allotment of land, even if opposed by the reservation Indians, must go forward." Gregory D. Kendrick, *Beyond the Wasatch* 20. To promote the assimilation of Indians into white society, "such allotments could be leased or sold to whites. . . . Interestingly enough, on the Uintah Reservation not only would Indian and white land be adjacent, but there would be a commingling of Indian-owned and white-owned water in jointly owned canals." *Id.*

III. TOWNSITE ACT

The Townsite Act to which the presidential proclamation establishing Duchesne Townsite makes reference provided that "[t]he President is authorized to reserve from the public lands, whether surveyed or unsurveyed, town-sites on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population." Rev. Stat. § 2380 (1874). The purpose of this Act was to reserve such a site from entry by homestead or preemption.⁽²⁾ Once a townsite was declared, the Secretary of the Interior was to "cause . . . such reservation[], or part thereof, to be surveyed into urban or suburban lots of suitable size, and to fix by appraisalment of disinterested persons their cash value, and to offer the same for sale at

public outcry to the highest bidder." Rev. Stat, § 2381.

IV. HISTORY OF SUBJECT WATER RIGHTS

On July 25, 1905, almost two months after the Secretary of the Interior had instructed the Commissioner of Indian Affairs to recommend sites for reservation as townsites, nineteen days after the Commissioner had recommended Duchesne as a townsite, and one day before the General Land Office ordered a survey of Duchesne, G. B. Hall, Captain 5th Calvary and Acting Indian Agent for the Uintah Indian Reservation, filed two Applications to Appropriate Water with the Utah State Engineer: Application 43-180 and Application 43-203. In the Application, Hall explained the purpose for Application 43-180: "This application is intended for irrigation and domestic supply for townsite purposes in the lands herein described." The purpose for Application 43-203 was explained in the following way: "The water applied for is for the purpose of irrigating Indian allotments on the Uintah Indian Reservation, Utah, made under the Act of May 27, 1902, and for an irrigating and domestic water supply for townsite purposes in the lands herein described." Although application 43-203 was originally intended to benefit both Indian allottees and the townsite, in November 24, 1920, prior to the perfection of the water right, the U.S. Indian Service submitted a change application which provided that the entire appropriation was to be used for "municipal and domestic purposes in the town of Duchesne, Utah." This change is reflected in the final Certificate of Appropriation.

There appears to be no dispute that the water rights have been used since their appropriation for water supply for Duchesne City. Bernice P. Meham, one of the original settlers of Duchesne explained that "[w]ater from the town of Duchesne was taken out in a ditch on the Duchesne river about one half mile above town in 1905." See Dillman, *supra*, at 215. Considering that in 1905 the main concentration of stores and related building was in the lower southeast corner of the townsite,⁽³⁾ the location of the original place of diversion of water right 43-180 places it approximately one-half mile up the Duchesne River. Further, in the letter from C.C. Mickelson, Duchesne City Councilman, to Ed Watson, State Engineer (May 20, 1947), Councilman Mickelson explains that "[w]hen the canals were built the Government put pad-locks on the gates in the fall of 1905 and in the spring took off the locks and turned all ditches over to the city of Duchesne. The City since this time has taken care of the water."

The United States Indian Service, Bureau of Indian Affairs, and Indian Irrigation Service (hereinafter collectively referred to as "Indian Agencies") have always acknowledged this fact. On two occasions in 1911, for instance, the United States Indian Service, Superintendent of Irrigation, sent letters to Caleb Tanner, Utah State Engineer, in which he acknowledged that water right no. 43-180 was intended to benefit only the Duchesne City townsite. See Letter from Superintendent of Irrigation, United States Indian Service, to Caleb Tanner, State Engineer (Nov. 10, 1911)⁽⁴⁾; Letter from Superintendent of Irrigation, United States Indian Service, to Caleb Tanner, State Engineer (Dec. 8, 1911). Although the Indian Agencies acknowledged that the Duchesne Townsite was to be benefited by these water rights, they were the agencies that pursued and finally obtained the perfected water rights in January of 1921. See Letter from the Utah State Engineer to Mr. Jes. M. Bryant, U.S. Indian Services (May 26, 1919); Certificates of Appropriation of Water Nos. 1034 & 1056.

Apparently no issue arose as to the ownership or status of these water rights again until approximately 1946. On June 10, 1946, Duchesne City Council Water Chairman, C. C. Mickelson wrote to the State Engineer's office inquiring about water rights 43-183 and 43-203. See Letter from C.C. Mickelson to State Engineer (June 10, 1946). The state engineer informed Mickelson that the water rights were in the name of the U.S. Indian Service. See Letter from State Engineer to C.C. Mickelson (June 14, 1946).

When in March 1947, Duchesne City applied for a permanent change of the point of diversion, *see* Application for Permanent Change of Point of Diversion, Place and Nature of Use of Water, a flurry of correspondence began. On March 11, 1947, the state engineer wrote to Duchesne City explaining that the U.S. Indian Service rather than Duchesne City was the proper entity to bring the application, and, therefore, the application would not be accepted from the City. *See* Letter from Ed. H. Watson, State Engineer, to Duchesne City Corporation (March 11, 1947).

On March 17, 1947, Mickelson wrote a letter to Superintendent Stone of the Uintah and Ouray Indian Agency explaining the situation. Stating that the Agency water engineer was "of the opinion that this water belonged to the City" because of the United States patents issued to the individual Duchesne city land owners, he asked for the Agency's cooperation. *See* Letter from C.C. Mickelson to Superintendent Stone (March 17, 1947). Superintendent Stone referred the matter to the Indian Office in Chicago, Illinois. *See* Letter from Forrest R. Stone to C.C. Mickelson (March 19, 1947).

Apparently, the Indian Agency approved the City making the change. In a letter to Ed Watson from Mickelson, Mickelson explained:

We submitted this application to the Uintah & Ouray Agency, Indian Department and they in turn submitted the question to the Attorney, who as we understand, informed them that this change could be made.

About two weeks ago Mr. William Preece and two representatives of the Indian Service were in my office here at Duchesne to look over the proposed change. I presented them with a photostatic copy of a patent issued by the United States conveying title to the lots in the City of Duchesne, along with the water rights. These men took this patent and as of April 23, I received a letter from Superintendent F.R. Stone of the Uintah & Ouray Agency, stating for us to proceed with our application. Therefore the same [is] being returned to you.

The City lots in question to be watered are all patented by the owners. The City of Duchesne ha[s] always taken care of the ditches and water system.

Letter from C.C. Mickelson to Ed Watson, Utah State Engineer (April 25, 1947).

The State Engineer's office then responded that it would consider Duchesne City as the "contract holder" of the water rights, and requested that the U.S. Indian Service designate its approval on the application. *See* Letter from Ed. H. Watson to C.C. Mickelson (May 9, 1947). Not content with this response, Mickelson again responded to the State Engineer stating that

Mr. Massey of the [U.S. Indian Service] informs me that according to the deeds (Patents) the department released their title if any on the filings when the patents were issued. This is what I have maintained all the time, that the water passed with the land. When the canals were built the Government put pad-locks on the gates in the fall of 1905 and in the spring took off[f] the locks and turned all ditches over to the city of Duchesne. The City since this time has taken care of the water.

A copy of a patent is inclosed herewith which gives proof of water, and title to same.

Letter from C.C. Mickelson to Ed Watson (May 20, 1947). On May 26, 1947, the State Engineer relented and allowed the city to file the change application under its name. *See* Letter from Ed. H. Watson to C.C. Mickelson (May 26, 1947).

The issue of ownership did not arise again until 1966. Apparently, the U.S. Indian Service name was not removed from the water rights. E. J. Skeen, a noted Utah water lawyer and then water attorney for Duchesne City, sent a letter to the United States Indian Service, Fort Duchesne, Utah, inquiring about the water rights. *See* Letter from J. Stuart McMaster, Regional Solicitor, United States Department of the Interior, to E. J. Skeen (May 31, 1966). Stuart McMaster, Regional Solicitor of the U.S. Department of the Interior, explained that he would like to discuss with Skeen his basis for a claim of ownership, because McMaster was "unable to find any evidence of transfer or an intention to transfer any of these right to the Town of Duchesne." *See id.* For the first time, it "was suggested that the original intent of these applications envisioned an ultimate establishment of an Indian town such as occurred at Randlett, [Utah]." *Id.*

In 1969 and 1970, Skeen apparently attempted to perfect the City's title to the water rights by having all of the individuals in Duchesne City quit-claim their water rights which they received by patent from the United States pursuant to the Townsite Act. *See* Minutes of a Special Hearing Called by the Duchesne City Council, April 15, 1970, at 7 p.m.; Memorandum from Jerry Olds, State Hydrologic Engineer to the File (March 3, 1976). These deeds were all submitted to the State Engineer of Utah.

In 1989, Duchesne City submitted another change application. The application was submitted by the city of Duchesne in the name of United States Indian Irrigation Service - Owner ⁽⁵⁾ c/o Duchesne City - User. *See* Application for Permanent Change of Water. It was approved August 3, 1993, without any objection by either the Ute Tribe or the federal government.

It is apparent that for many years the federal government has believed that it had no interest in the water rights at issue. The current Utah State Engineer "is aware of the issues concerning these water rights and is supportive of Duchesne City's efforts" to obtain "a conveyance from the United States." *See* Letter from Robert L. Morgan, P.E., State Engineer, to J. Craig Smith (Oct. 27, 1998). Others have been supportive as well, including individuals intimately involved with the federal government and Indian interest. *See* Memorandum from David Allison, Superintendent U&O Agency, Ft. Duchesne, to Phoenix Area Director; Letter from Gayle F. McKeachnie to William R. McConkie, Office of the Solicitor, Department of the Interior (Aug. 28, 1996).

V. APPLICATION OF HISTORY TO PRESENT CONTROVERSY

It seems apparent that when one considers the entire history of Duchesne City, the water rights at issue, the Indian Irrigation Projects, and the Townsite Act, the water rights rightfully belong to the city of Duchesne.

From 1861 to 1905, the land which now comprises Duchesne City was part of a vast Indian reservation. In 1903, Congress declared that the Indians on the reservation were to be given allotments and that all of the remaining unallotted lands were to enter the public domain. From 1903 until August 28, 1905, the Indian Agents on the land were aware that all Indian land that was unallotted would become part of the public domain, open to entry under the homestead and townsite acts existent at that time.

Pursuant to the townsite act's authority and knowing that the day was soon approaching that the land would be open to entry, on June 7, 1905, the Secretary of the Interior asked the Commissioner of Indian Affairs to recommend land that would be suitable for townsites. Townsites by definition would be land, in the public domain, exempted from homestead entry but subdividable and open for purchase by anyone. On July 6, 1905, the Acting Commissioner of Indian Affairs reported the action of the Uintah Allotment Commission recommending that the land now comprising Duchesne City be declared a townsite. That was approved. On

July 25, 1905, a United States Calvary Captain and agent of the United States Indian Service, applied for water rights to serve the Duchesne Townsite for the benefit of those who located their homes there. In the application for the townsite water rights, no mention was made that the water was to benefit any Indian allottees. Since 1921, when the water rights were perfected, the Indian Agencies have had little, if nothing, to do with these water rights. In fact, in 1947, it was their position that they had no claim to these water rights. That is still the position of both the Agencies and the Ute Tribe. See November 19, 1998 letter,, from Harold A. Ranquist to Tod J. Smith (water counsel for the Tribe), David Allison (Superintendent, Ute Reservation), William R. McConkie (Regional Solicitor's Office, Interior Department), Lynn Hansen (Uintah Ouray Agency) confirming this position reaffirmed at a meeting with the recipients on November 13, 1998.

It has been suggested in two documents since 1966 that the reason that the water rights were applied for by the United States Indian Service was that they assumed that Duchesne was to become an Indian community. However, neither document cites any reason for this suggestion. The history of Duchesne City suggests just the opposite conclusion. By June 6, 1905, fifty-two white settlers, and one Indian, began to establish a town at the Duchesne Townsite. Murdock, who had years earlier obtained a concession from the United States Government to establish an Indian trading post at Duchesne, and some of the other white settlers, worked from June through the summer to obtain the government's approval for a townsite. Given this factual background, there is no reason for an Indian agent, who was certainly aware of Murdock and the others settling on the land and their involvement in getting the townsite declared, to assume that the townsite would become anything other than a Townsite for settlement by any who located and lived there, Indian and non-Indian.

The Secretary of the Interior specifically instructed the Commissioner of Indian Affairs to suggest places for townsites on the Uintah Indian Reservation. The establishment of a townsite provided was open to settlement by anyone including non-Indians. Thus, the Indian Agencies established the townsites on what would become public land pursuant to the Townsite Act. It makes sense that the Secretary of the Interior would ask the Indian Agencies to become involved, because, of course, (1) they were the ones negotiating with the Indians on the reservation land, (2) they were the ones that were allotting the lands to the Indians, (3) they were the ones who had been responsible for the administration of the lands, (4) they were the branch of the Interior Department, which was the Department responsible for the establishment of townsites, immediately in the vicinity of the land, and (5) the government was then pursuing a policy of assimilation which encouraged the mingling of white settlers with Indians.

Finally, what seems the most important fact against the suggestion that the water rights were to be only for the Indians located at the Duchesne townsite was that when the United States Indian Service applied for water rights for Indian allottees it specifically mentioned that it was doing so. For example, in application 43-203, the Indian agent applied for water rights for the Duchesne Townsite and then separately applied for the Uintah Indian reservation Indian allottees to be served by the water rights. In the case of applications 43-203 and 43-180 for the townsite water rights, the Indian Service asked for the appropriation for the benefit of the townsite only. No claim on Duchesne's water rights had ever been made by the Tribe or by the United States on behalf of the Tribe. In fact, in 1960 the claims of all water rights for the Tribe were made by the United States, with the Tribe's approval, in a report by E. L. Decker which has become known as "the Decker Report." This report does not include any Tribal claim to water rights 43-180 or 43-203, nor does the Ute Indian Water Compact. The Tribe is aware of and supports Duchesne City's efforts to resolve the title to Water Rights 43-180 and 43-203 and transfer the title to the City or a district created and controlled by it. *See* Letter from Tod J. Smith (Special Water Counsel of the Ute Indian Tribe) to Derril Jordan (Associate Solicitor for Indian Affairs, U.S. Department of the Interior) and Cathy Wilson (Water Rights

Specialist, Phoenix Area Office, Bureau of Indian Affairs) (Sept. 21, 1999).

CONCLUSION

When one views the historical context of the application for appropriations of water at issue and the history of that use since the application, it can reasonably be determined that the United States Indian Service applied for water rights solely for the benefit of the Duchesne Townsite with the knowledge that the townsite would be comprised mainly of non-Indian settlers and some Indians. Given these reasonable grounds and the positions of the various agencies involved, it is appropriate for the United States Congress to grant Duchesne's request for issuance of a deed to the water rights finally resolving this matter for the good. I respectfully urge this Committee to recommend the approval of H.R. 3468.

SUPPLEMENTAL SHEET

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TOPICAL OUTLINE & SUMMARY

I. General History of Duchesne City

Duchesne City was established as a township after the Uintah Indian Reservation was open to settlement in 1905.

II. Indian Irrigation Projects

In 1906, the Uintah Indian Irrigation project was established and Congress appropriated \$600,000 for the project with most of the work being done by local farmers. The Act established that Indian Agencies adhere to the laws of the state of Utah for the appropriation of waters. The underlying premise of these types of projects was to assimilate the Indians into white society.

III. Townsite Act

The purpose of the Townsite Act was to reserve a site from entry by homestead or preemption, to subdivide the site, and to sale the lots by auction to the highest bidder.

IV. History of Subject Water Rights

On July 25, 1905, G.B. Hall, Captain 5th Calvary and Acting Indian Agent for the Uintah Indian Reservation, filed two Applications to Appropriate Water with the Utah State Engineer: Application 43-180 and 43-203. The Applications were intended for irrigation and domestic supply for Duchesne townsite purposes. The water rights have always been used for water supply to Duchesne City. Over the course of years, several attempts have been made to place the water rights in Duchesne City's name and all have failed despite all knowledgeable people's and agencies' acknowledgements that the water rights were

perfected for and have been used by Duchesne City exclusively.

V. Application of History to Present Controversy

The history of Duchesne City, the Indian Irrigation Projects, the Townsite Act, and the water rights at issue demonstrate the water rights rightfully belong to the city of Duchesne.

1. There is some confusion about the name of the town when it was settled. It was originally called Duchesne on the Field Notes of the survey done at the direction of the Department of the Interior. *See* Field Notes of the Survey of the Townsite of Duchesne (Sept. 28, 1905) (hereinafter referred to as "1905 Field Notes"). Apparently, the postal service objected to the name because it "conflict[ed] with nearby Fort Duchesne." John W. Van Cott, *Utah Place Names* 117 (1990). For a time the townsite was called Strawberry, then Dora, and then Theodore. *See id.*; Barton, *supra*, at 181; Dillman, *supra*, at 190-91, 205.
 2. As discussed *supra* part II, it appears that a further purpose of creating the Duchesne Townsite was to create a community that could render services to the Indian community. Water was necessary to fulfill that purpose. Hence, government representative filed on water with the appropriate state official.
 3. Mecham explained that the "townsite was just above the junction of the Strawberry and Duchesne rivers." *See* Dillman, *supra*, at 205. Further, she says that Murdock's store and the Post Office were "at the bend of the Duchesne." *See id.* The Duchesne and Strawberry rivers converge just east of the townsite. *See* Plat. The bend just before the convergence is in the lower south east portion of the platted townsite. Pictures also demonstrate that the concentration of the town was in the lower southeast portion. *See* Dillman, *supra*, at 193.
- Further evidence that the concentration of town was in the southeast portion is the 1917 plat subdividing the northeast section of town. *See* Plat of Part of the Townsite of Duchesne, Utah. The plat shows that only the southeast portion of the townsite had been subdivided in 1905. *See id.*
4. Interestingly, the November 11, 1911 letter appears to be a form letter addressed to a general extension of all water rights for which the Indian Agencies had applied in 1905. *See* discussion *supra* part II. The letter references a project involving approximately 90,000 acres. Certainly, this was not referencing the townsite land. It is apparently speaking to the entire acreage appurtenant to all of the water rights for which the Indian Agencies had applied. *See* Kendrick, *supra*, at 25-27.
 5. It is important to note that the actual Certificate of Appropriation of Water states that the owner of both water rights is the U.S. Indian Service, not the Indian Irrigation Service. As discussed in part II *supra*, the Indian Irrigation Service was not created until 1909 so the Indian Irrigation Service could not have been the agency that applied for the rights.

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